APPENDIX A

SEPTEMBER TERM, 1968 — SEPTEMBER SESSION, 1968

No. 16661
ANTHONY J. SCHERER, JR.,
Plaintiff-Appellant,
v.
KENNETH MORROW,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

September 25, 1968

Before CASTLE, *Chief Judge*, MAJOR, *Senior Circuit Judge*, and SCHNACKENBERG,* *Circuit Judge*.

CASTLE, *Chief Judge*. Plaintiff brought this action in the Circuit Court of Cook County for damages resulting from alleged slanderous statements made by defendant, a United States Secret Service agent, outside the scope of his official duties. The action was removed to the District Court, which granted defendant's motion for summary judgment on the ground that there was no genuine issue of material fact as to whether defendant was acting within the scope of his official duties, thus compelling the conclusion that the statements were absolutely privileged.

Defendant's statements were made during a normal question and answer period following an assigned lecture

* While Judge Schnackenberg participated in the hearing of oral arguments and a conference of the division judges above-named, he died prior to the adoption of this opinion. He was of the view that the judgment order of the district court should be reversed.

to police cadets regarding the operations of the Secret Service in protecting the President of the United States. The alleged statements — that plaintiff was a "nut" and that the Secret Service had dismantled a cannon plaintiff had pointed at O'Hare Field the day President Johnson came to Chicago in 1964 — were made only in response to a question of one of the cadets and only for the purpose of using a pertinent local incident to demonstrate the functions of the Secret Service. The record indicates, as the District Court found, that since plaintiff possessed a "large collection of dangerous arms, including a 25 m.m. cannon," he was among those persons who might pose a danger to the President, concerning whose protection defendant was lecturing, and therefore defendant was acting within the outer perimeter of his line of duty in answering the question regarding the Secret Service's action toward plaintiff.

A federal official cannot be held personally liable for acts committed within the outer perimeter of the official's line of duty. *Barr* v. *Matteo,* 360 U.S. 564 (1959). To be within that perimeter, and therefore absolutely privileged, "[I]t is only necessary that the action bear some reasonable relation to and connection with the duties and responsibilities of the official." *Scherer* v. *Brennan,* 379 F.2d 609, 611 (7th Cir. 1967). We hold that defendant's actions in the instant case were absolutely privileged as being within the outer perimeter of his line of duty. The judgment below is therefore affirmed.

AFFIRMED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Wednesday, September 25, 1968

Before

HON. LATHAM CASTLE, *Chief Judge*
HON. J. EARL MAJOR, *Senior Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge**

No. 16661
ANTHONY J. SCHERER, JR.,
Plaintiff-Appellant,
v.
KENNETH MORROW,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

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* While Judge Schnackenberg participated in the hearing of oral arguments and a conference of the division judges above-named, he died prior to the adoption of this opinion. He was of the view that the judgment order of the district court should be reversed.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of

The opinion filed September 25, 1968

The judgment order entered September 25, 1968

Cause No. 16661
ANTHONY J. SCHERER, JR., *Plaintiff-Appellant*
vs.
KENNETH MORROW, *Defendant-Appellee*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 15th day of November A.D. 1968.

Kenneth J. Carrick by
Clerk of the United States Court of Appeals for the Seventh Circuit.
John M. (illegible)

(SEAL)

APPENDIX D

MEMORANDUM OPINION
(Filed October 9, 1967)

Defendant's Motion for Summary Judgment

On December 10, 1965, defendant Kenneth Morrow, a Special Agent of the United States Secret Service, delivered a lecture regarding the history, jurisdiction, funtions, and activities of the Secret Service, before a class of cadet police officers of the Chicago Police Department Academy. During a question and answer period following the lecture, a question was asked by one of the cadet officers about Anthony J. Scherer, Jr., plaintiff herein. Plaintiff alleges that Morrow responded as follows:

> "That Scherer, he's a 'nut' "
>
> "We went to his house and deactivated a cannon that he had pointed at O'Hare Field the day President Johnson came to Chicago."

Relying upon the foregoing statements, plaintiff brought this action in the state courts, charging that defendant had maliciously defamed his reputation.

Defendant properly removed the suit to this court, under the provisions of 28 U.S.C. Secs. 1442 and 1446, and has now filed a motion for summary judgment, supported by affidavits. He asserts that he was acting within the scope of his official authority at the time in question, and that under the doctrine of *Barr* v. *Matteo,* 360 U.S. 564 (1959), he is absolutely privileged from any personal liability for actions committed in pursuance of his official duties.

Barr v. *Matteo,* although on a 5-4 decision, firmly pronounced that actions of government personnel acting within the "outer perimeter" of their authority, are absolutely

privileged from suit, despite allegations of malice in the complaint. The reasons for the official immunity doctrine are these (360 U.S. at 571):

> " . . . It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to government service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government . . . "

The classic statement in support of the privilege was written by Judge Learned Hand in *Gregoire* v. *Biddle,* 179 F.2d 579, 581 (2d Cir. 1949), and was quoted in *Barr* v. *Matteo:*

> " . . . The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burdens of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unuinching discharge of their duties. Again and again, the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith . . . "

Barr has been followed and cited on numerous occasions, in this Circuit, and elsewhere. See e.g. *LeBurkien* v. *Notti,* 365 F.2d 143 (7th Cir. 1966); *Sauber* v. *Gliedman,* 283 F.2d 941 (7th Cir. 1960); *Chafin* v. *Pratt,* 358 F.2d 349 (5th Cir. 1966); *Kelly* v. *Dunne,* 344 F.2d 129 (1st Cir. 1965); *Chavez* v. *Kelly,* 364 F.2d 113 (10th Cir. 1966). In *Norton* v. *McShane,* 332 F.2d 855 (5th Cir. 1964), cert. denied 380 U.S. 981 (1965), it was held that the privilege attaches

where the challenged action bears some reasonable relation to or connection with the duties and responsibilities of the official.

Most recently, in *Scherer* v. *Brennan and Noack,* 66 C 846, September 22, 1966, a case related to this one, Judge Perry of this Court granted defendants' motion for summary judgment based upon the immunity theory. The Seventh Circuit affirmed on June 21, 1967 (Case No. 15,961, not yet reported), stating:

> "We hold the District Court was correct in granting defendants' motion for summary judgment. It is clear that defendants were immune from this tort suit because their actions fell within the scope of their duties to protect the person of the President of the United States. Their actions were, at least, 'within the outer perimeter' of their duties. *Barr* v. *Matteo,* 360 U.S. 564, 575, reh. den. 361 U.S. 855."
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> * * *
>
> "It is well established that federal officials cannot be held personally liable in damages for an act committed within the general scope of their official authority and in the performance of their official duties."

The same legal principles which governed *Scherer* v. *Brennan,* should govern here. Thus the only issue for decision is whether defendant was acting within the "outer perimeter" of his duty.

His own affidavit, and that of his immediate supervisor, Maurice G. Martineau, set forth the circumstances by which defendant supports his allegation that he was acting within the general scope of his official authority. Essentially those circumstances are as follows.

Title 18, United States Code, Section 3056, defines in part, the duties of the United States Secret Service, as follows:

"Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States . . . "

Pursuant to his authority under the aforesaid statute, the Acting Secretary of the Treasury promulgated Treasury Department Order No. 173-3, on October 29, 1965, which established the office of Director of the United States Secret Service, whose duties were to include:

"(1) Create appropriate subordinate offices and assign to all offices such functions and duties as he determines to be necessary or desirable, and . . .

"All present functions and duties of the Chief, United States Secret Service, including functions under any delegation of authority to that officer made pursuant to the provisions of any Treasury Order, are transferred to the Director, United States Secret Service."

Pursuant to his authority, the Director compiled the United States Secret Service Manual, which provides in pertinent part:

"It will always be paramount that law enforcement organizations be made knowledgeable of our responsibilities in order for us to obtain their full cooperation. They must have as much information as necessary in order to carry out their support function. Their instructions must be explicit so that they are clearly aware of all Secret Service requirements." (Section 911.1, paragraph 4) "Lectures may include remarks on Presidential protection only in relation to our responsibilities as prescribed by law. (This does not apply to training lectures before law enforcement groups.)" (Section 912.2, paragraph 3)

"Each SAIC (Special Agent in Charge) is responsible for the establishment and development of effective public relations within his district. The necessity

> for establishing personal contact with other law enforcement officials . . . is self-evident." (Section 912.1, paragraph 3)
>
> "Lectures on the history of the Secret Service, jurisdictional responsibilities and activities will be made by SAIC's and SA's (Special Agents) who are qualified speakers . . . " (Section 912.2, paragraph 1)

Mr. Martineau, at that time the Assistant Special Agent in Charge of the Chicago District, states in his affidavit that pursuant to the above authority, he directed defendant Morrow to lecture before a class of cadet officers of the Chicago Police Department on the history, jurisdiction, functions and activities of the United States Secret Service. The purpose of the lecture was to:

> " . . . instruct the cadet officers so as to make them knowledgeable of all Secret Service responsibilities and to enable them to extend to the Secret Service the fullest cooperation and support in the discharge by the Secret Service of its statutory responsibilities." (Martineau affidavits, page 2)

The foregoing facts are undisputed by plaintiff in his affidavit, and must stand as admitted. It is noteworthy that plaintiff's affidavit sets forth only the facts of the statement of defendant before the cadets, in hearsay fashion, and does not challenge defendant's actions as being outside the scope of his official duties. In his brief, plaintiff makes only one feeble argument on that issue, and that with reference to Section 912.2, paragraph 3, of the Secret Service Manual, which provides:

> "Lectures may include remarks on Presidential protection only in relation to our responsibilities as prescribed by law. (This does not apply to training lectures before law enforcement groups.)"

He would have us believe that lectures before law enforcement groups may not include remarks on Presidential protection. Although the Section is open to two interpretations, the one chosen by plaintiff is not very impressive. Certainly the correct view must be that training lectures on Presidential protection before law enforcement groups are not limited "only" to responsibilities as prescribed by law, but in fact may go beyond that limitation. As the defendant points out, it is well known that local and state law enforcement bodies work closely, in a supporting role, with the Secret Service in protecting the president. It is logical that they should be made aware of the procedures used by the Secret Service to protect him, in much greater detail than outside groups with no need for such knowledge. Indeed, Section 911.1, paragraph 4 of the Secret Service Manual, cited above, makes it obligatory for local Secret Service Agents to provide such information to police bodies.

It would seem prudent to restrict the flow of tactical information to disinterested groups to that made a matter of public record by statutory promulgation. On the other hand, police officers should be filled in on the nature of the procedures employed to protect the President, if they are to adequately perform their role as support personnel.

Plaintiff's interpretation of paragraph 3 is without merit in this Court's opinion. Clearly defendant was acting pursuant to his official duties in lecturing a police group on methods of Presidential protection.

Plaintiff's only argument having been rejected, it, therefore, is uncontroverted that defendant was acting in the course of his official duties when he made his remarks concerning the plaintiff. It is common knowledge that extreme security precautions are observed by the Secret Service when protecting the President. Such precautions

routinely include surveillance of persons thought to pose a danger to him. As fully detailed by Judge Perry's opinion in *Scherer* v. *Brennan and Noack,* plaintiff possessed, and indeed may still possess, a large collection of dangerous arms, including a 25 m.m. cannon that could pentrate a concrete wall. It is reasonable to conclude that in connection with their support functions and otherwise, Chicago policemen would be interested in knowing the identity and whereabouts of plaintiff. We think defendant's actions made a reasonable connection to the general matters committed by law to his control or supervision, and were not "manifestly or palpably beyond his authority." *Norton* v. *McShane,* 332 F.2d 855, 859 (5th Cir. 1964).

Since it is clear that defendant was acting within the line and scope of his official duties, and that no genuine issue of material fact thereon exists, the rationale of *Barr* v. *Matteo* must govern, and an absolute privilege must attach to defendant's activities.

Plaintiff has announced his intention to file a petition for certiorari in *Scherer* v. *Brennan and Noack,* with the hope that the Supreme Court will overrule *Barr* v. *Matteo.* He asks that we defer decision on this motion until after the other case is resolved. We see no reason to delay action herein.

Defendant's motion for summary judgment is granted and the complaint must be dismissed, with costs to be assessed against plaintiff.

Enter: *A. L. Marovitz*
Abraham L. Marovitz
Judge

Dated: September 29, 1967